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BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of Wildon Associates	)	SWRCB File _____
	)	
	)	PETITION OF SAN DIEGO REGIONAL
	)	WATER QUALITY CONTROL BOARD
	)	INVESTIGATIVE ORDER AND
	)	REQUEST FOR STAY DATED
	)	FEBRUARY 23, 2009
_____	)	

1. **Name and address of the Petitioner.**

Wildon Associates, a California Limited Partnership ("Wildon").

Correspondence or questions regarding this petition should be directed to Clint Blain at the address, email address, or telephone number listed above.

2. **The specific action or inaction of the regional board which the state board is requested to review and a copy of any order or resolution of the regional board which is referred to in the petition, if available. If the order or resolution of the regional board is not available, a statement shall be included giving the reason(s) for not including the order or resolution.**

The "specific action or inaction of the Regional Board" for which Wildon Associates requests State Board review is the Regional's Board's issuance to Wildon of the Investigative order dated February 23, 2009 ("Order") attached as Exhibit A.

3. **The date on which the regional board acted or refused to act or on which the regional board was requested to act.**

The Order is dated February 23, 2009.

**4. A full and complete statement of the reasons the action or failure to act was inappropriate.**

The complete statement and reasons the Regional Board's actions are inappropriate are set forth below in the Memorandum of Points and Authorities.

**5. The manner in which the petitioner is aggrieved.**

Wildon has been aggrieved because (i) Wildon has been ordered to conduct a "basinwide" survey and will incur substantial penalties for non-compliance even though no evidence was presented that Wildon is a "discharger," or that it is engaged in "Agricultural Activities" thereby denying Wildon due process; and (ii) Wildon has been ordered to conduct a "basinwide" survey at a cost of over \$500,000 which constitutes an egregious abuse of discretion by the Regional Board, is arbitrary and capricious and against public policy and is procedurally unfair. The points and authorities set forth below address these issues more thoroughly.

**6. The specific action by the state or regional board which petitioner requests.**

Wildon requests that, pursuant to 23 C.C.R. Section 2052(a)(2)(C), the State Board direct the Regional Board to (i) withdraw the Order; and (ii) pay Wildon's attorney's fees.

**7. A statement of points and authorities in support of legal issues raised in the petition, including citations to documents or the transcript of the regional board hearing where appropriate.**

See Memorandum of Points and Authorities below.

**8. A statement that the petition has been sent to the appropriate regional board and to the discharger, if not the petitioner.**

A copy of this Petition has been provided to the Regional Board. The Regional Board may simultaneously treat this Petition as a Request for Reconsideration.

**9. A statement that the substantive issues or objections raised in the petition were raised before the regional board, or an explanation of why petitioner was not required or was unable to raise these substantive issues or objections before the regional board.**

The Regional Board issued the Order without a hearing and without providing any evidence of wrong-doing by Wildon, as is required by Water Code Section 13267. On March 4, 2009, Petitioner requested the Regional Board to provide evidence of (i) any engagement in Agricultural Activities by Wildon; and (ii) the discharges Wildon allegedly engaged in. A copy of the March 4, 2009 request is attached hereto as Exhibit B. The Regional Board has not provided any evidence whatsoever, has not responded to the request, so any attempt to raise the issue with the Regional Board would seem to be futile. In addition, as stated in number 8 above,

the Regional Board may treat this petition as a Request for Reconsideration and withdraw the Order on its own accord.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

The Regional Board's issuance of the Order to Wildon exceeded the Regional Board's authority under Water Code Sections 13267. The provision authorizes the Regional Board to order a "discharger" to submit technical, monitoring, or other reports regarding the discharge, but the Regional Board has failed to provide any evidence that Wildon is a discharger. In addition, assuming for arguments sake that Wildon is a "discharger", the statute cannot possibly be interpreted to allow the Regional Agency to force a private citizen to conduct testing on a "watershed wide" basis at a cost of over \$500,000.

### **II. BACKGROUND**

Wildon does not farm, does not raise crops, and does not use fertilizer in its operations. Wildon operates a hunting club and the property is devoted exclusively to hunting and predominately the hunting of waterfowl. There is no profit derived from its activities and great expense has been incurred over the years to maintain the property as habitat. Wildon granted a conservation easement to the State of California in 1989 and the entire Wildon property is devoted to preservation of habitat.

The Order does not mention the activity it is trying to govern other than a vague reference to "agriculture activities". The Order does not identify any pollutant that Wildon has allegedly discharged. Since the Order refers to the "Lake Elsinore and Canyon Lake Nutrient Total Maximum Daily Loads", one would assume that the activity this nebulous "Order" is attempting to regulate is the discharge of fertilizer and manure into the incumbent watershed. Since Wildon does not raise crops, and does not utilize fertilizers, and does not own or allow any manure generating farm animals on the property, and there is no evidence presented that Wildon has engaged in any of these activities, the Order must be rescinded. If the Order is directed at the use of reclaimed water distributed by the Eastern Municipal Water District, the Order must be rescinded without specific evidence that Wildon's activities have "discharged" excess nutrients. Wildon's activities on the property include creating wetlands which actually reduce the amount of nutrients in the water so it is incumbent on the Regional Board to provide some real evidence that Wildon has "discharged" more nutrients than it receives from the Eastern Municipal Water District.

In 2008, Wildon Associates, and its general partner, Ramona Hunt Club, a California corporation, received the benefits of a Federal Grant from the Department of the Interior in connection with the North American Wetlands Conservation Act (NAWCA), specifically, the California Coastal and Inland Waters Project. The purpose of this grant was to restore or create wetlands. The grant was administered by the California Waterfowl Association and the California Department of Fish and Game was involved in some aspects of the grant and/or similar grants with regard to the San Jacinto Wildlife Area which completely surrounds Wildon's property.

Pursuant to the grant, nearly all of the potentially farmable land was re-graded to make ponds which are flooded to create wetlands. The California Waterfowl Association designed the master plan to enhance wetlands and to provide habitat for certain endangered species. Wildon also spent a percentage of matching funds in order to develop these additional wetlands and habitat. The ponds are designed to be self contained and to capture water rather than discharge water. Collected water will be pumped from lower elevations to higher elevations and then released to the lower ponds to simulate natural wetlands wet and dry periods

Wildon's property was a farm at one time but it has been used as a hunting club since 1975, with some occasional dry farming by independent operators. Wildon Associates has never engaged in any agricultural activities at any time as the term "agricultural activities" would be used in plain English. It now has no farming and about the only area not dedicated to wetlands habitat is a small area where certain structures are located and an area designated as Stevens Kangaroo Rat Habitat which cannot be farmed.

Wildon has not engaged in revenue generating activities such as farming or dairy operations. Instead, through the Conservation Easement granted in 1989 and the NAWCA grant partnership entered into in 2008, the property is held for the preservation of habitat. Wildon Associates creates wetlands where none would exist but for the effort and expense of Wildon. To describe Wildon as a "discharger" is an obscene perversion of the statutory framework designed to protect the waters of this nation and state. The efforts of Wildon enhance the quality of water in the San Jacinto Watershed by absorbing nutrients and the Order, without some evidence to the contrary, must be rescinded.

### **III. LEGAL ARGUMENT**

#### **A. Water Code Section 13267 Can Not Authorize the Order Because No Evidence has Been Provided that Wildon is a Discharger.**

Water Code Section 13267(a) states that a regional board, "in establishing or reviewing any water quality control plan or waste discharge requirements, or in connection with any action relating to any plan or requirement authorized by this division, may investigate the quality of the waters of the state within its region." In investigating the quality of the waters of the state, the Regional Board may require "technical or monitoring program reports" from any person who "has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region ..." (Water Code § 13267(b)(1)). The Regional Water Board does not have jurisdiction to issue an order under Section 13267 unless there is at least a "suspicion" of a discharge of a pollutant. The Regional Board admits they do not have any suspicion of pollution being discharged by Wildon. Rather, "agricultural activities" were identified by utilizing the County of Riverside Assessor Parcel Number database. The Order states the identification of agricultural activities was determined by aerial photographs "and/or" assessor records. The use of the word "or" means the agency could have used the assessor records only. In other words, according to the Regional Board, merely owning land that is designated as agricultural land is sufficient to be subject to the Order. The Porter-Cologne Water Quality Control Act was enacted by the State of California to implement the Federal Water

Pollution Control Act and merely owning land that is zoned for agriculture does not constitute an act conferring jurisdiction sufficient to utilize a Section 13267 Order.

Section 13267(b) requires the Regional Water Board to provide written explanation with regard to the need for the reports...

“... and shall identify the evidence that supports requiring that person to provide the reports.”

There was not one whit of evidence with regard to Wildon Associates referred to in the Order. The Regional Water Board has taken the idea that since “discharger obligations” can be collectively fulfilled, it only makes sense to turn it around to collectively charge individuals with a collective crime. They have put the cart before the horse. The only “evidence” even referred to at page 4 of the Order is the reference to modeling assumptions that agricultural operations in general cause the discharge of nutrients. However Section 13267(b) requires evidence of wrongdoing by the accused person. A failure to file the TMDL Reports is a misdemeanor (Water Code Section 13268) and generally in this country one cannot be convicted of a crime without some type of due process. As stated above, the mere ownership of land zoned for agricultural is not proof that agricultural operations are being conducted. There may be overwhelming evidence that drug gangs in certain neighborhoods contribute to violence but you can’t just send a letter to property owners in the neighborhood ordering them to start making arrests or be subject to a fine. Individual property owners may be ordered to clean up their properties and evict known drug dealers, but the order cannot be based simply on the property owner’s address which is essentially what the Regional Board is doing in this case. Section 13267 is very specific that the evidence upon which the Order is based relates to “that person” the order is directed at. No evidence whatsoever has been presented with regard to Wildon Associates.

As the Court stated in *Schutte & Koerting, Inc. v. Regional Water Quality Control Board, San Diego Region*, 158 Cal. App. 4th 1373; 71 Cal. Rptr. 3d 54; 2007: “The objective of statutory construction is to determine the intent of the enacting body so that the law may receive the interpretation that best effectuates that intent. [Citation.] ‘We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.’ [Citation.] If the plain, commonsense meaning of a statute’s words is unambiguous, the plain meaning controls.” (*Fitch v. Select Products Co.*, (2005) 36 Cal.4th 812, 818 [31 Cal. Rptr. 3d 591, 115 P.3d 1233].) The interpretation of a statute presents a question of law subject to de novo appellate review. (*CBS Broadcasting Inc. v. Superior Court*, (2001) 91 Cal.App.4th 892, 906 [110 Cal. Rptr. 2d 889].) In this case the statute is clear and states in plain commonsense language that evidence of a discharge by the person to be charged must be presented and this simply was not done.

No attempt has even been made by the Regional Board to comply with the evidence requirements of Section 13267(b). The Regional Board points to the fact pollution exists, but there is not even an attempt to show that Wildon Associates has discharged any waste of any type anywhere. Even with the relaxed evidence standard set forth in Section 13267(e) the Regional Board has failed to present any evidence of some bad act by Wildon which would even